90-874

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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SCHERING-PLOUGH CORPORATION, PLOUGH, INC.,
and PLOUGH SALES CORPORATION,
Petitioners,

vs.

RAY F. ALBANO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. When presented with an equitable argument by a plaintiff who fails to include a constructive discharge claim that is not "like or reasonably related" to the allegations in his administrative charge of discrimination, is a court prevented from weighing the equities favoring an innocent employer by the remedial goals of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*?

2. Is a plaintiff entitled to the extended limitations period under the Age Discrimination Claims Assistance Act of 1988, 29 U.S.C. § 626 note (1988), when the Equal Employment Opportunity Commission has completed its investigation of the plaintiff's charge and issued a notice of closure prior to the expiration of the statute of limitations for commencing suit under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Schering-Plough Corporation, Plough, Inc. and Plough Sales Corporation, pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 912 F.2d 384 and is reproduced as Appendix A to this petition. The Judgment and Minute Order of the United States District Court for the Western District of Washington are not reported but have been reproduced as Appendices B and C to this petition.

JURISDICTION

The opinion of the Court of Appeals was entered on August 30, 1990. This petition is filed within ninety days of that opinion. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination Claims Assistance Act of 1988, 29 U.S.C. § 626 note (1988), states in pertinent part:

> **Sec. 3. Extension of statute of limitations.**
>
> Notwithstanding section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 626(e) [subsec. (e) of this section], a civil action may be brought under section 7 of such Act [this section] by the Commission or an aggrieved person, during the 540-day period beginning on the date of enactment of this Act [Apr. 7, 1988] if —
>
> (1) with respect to the alleged unlawful practice on which the claim in such civil action is based, a charge was timely filed under such Act with the Commission after December 31, 1983,
>
> (2) the Commission did not, within the applicable period set forth in section 7(e) [subsec. (e) of this section] either—
>
> (A) eliminate such alleged unlawful practice by informal methods of conciliation, conference, and persuasion, or
>
> (B) notify such person, in writing, of the disposition of such charge and of the right of such person to bring a civil action on such claim,
>
> (3) the statute of limitations applicable under such section 7(e) [subsec. (e) of this section] to such claim ran before the date of enactment of this Act [Apr. 7, 1988], and

(4) a civil action on such claim was not brought by the Commission or such person before the running of the statute of limitations.

Sec. 4. Notice of statute of limitations.

(a) *Notice regarding claims for which statute of limitations is extended.*—Not later than 60 days after the date of enactment of this Act [Apr. 7, 1988], the Commission shall provide the notice specified in subsection (b) to each person who has filed a charge to which section 3 applies.

(b) *Contents of notice.*—The notice required to be provided under subsection (a) to a person shall be in writing and shall include the following information:

(1) The rights and benefits to which such person is entitled under the Age Discrimination in Employment Act of 1967 [this chapter].

(2) The date (which is 540 days after the date of the enactment of this Act [Apr. 7, 1988]) on which the statute of limitations applicable to such person's claim will run.

(3) That such person may bring a civil action on such claim before the date specified in paragraph (2).

STATEMENT OF THE CASE

Respondent Ray F. Albano ("Albano") resigned his employment with Petitioner Plough Sales Corporation ("Plough") on March 1, 1985. On February 15, 1985, Albano filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging age discrimination based on his failure to be promoted in January, 1985. The EEOC investigated Albano's promotion claim and on April 18, 1986 issued a written determination that it would not proceed further with the processing of Albano's charge because the EEOC had been unable to substantiate the allegations of discrimination contained in the charge. (App., A-22).

The charge of discrimination that Albano filed was never amended to allege unlawful termination, and no new charge was ever filed with the EEOC concerning Albano's termination. The only claim contained in the charge and investigated by the EEOC was the promotion issue. (App., A-18).

On January 23, 1989, almost four years after his resignation, Albano filed a complaint in the United States District Court for the Western District of Washington under the Age Discrimination In Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*, alleging age discrimination in the termination of his employment. Petitioners filed a motion for summary judgment on the grounds that the scope of a civil action under the ADEA is limited by the charge filed with the EEOC and that the allegations of unlawful termination contained in the complaint exceeded the scope of the EEOC charge. The District Court granted summary judgment.

Albano appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the grant of summary judgment. The Court of Appeals held that equitable considerations excused Albano's failure to file an EEOC charge with respect to his termination and that a finding that the relative equities weigh in favor of an employer, and against an employee, would be contrary to the ADEA's remedial goals. The Court of Appeals further held that the Age Discrimination Claims Assistance Act of 1988, 29 U.S.C. § 626 note (1988) ("Claims Act"), applied to extend the limitations period for Albano to commence a civil action even though the EEOC completed its investigation and closed the file on his charge on April 18, 1986 (Affidavit of Leino, [App., A-15]) — well within the two-year period or three-year period (in the event of a willful violation) from the date of the termination of Albano's employment (March 1, 1985) for a civil action to be commenced. 29 U.S.C. § 626(e)(1).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. The Remedial Goals of the Age Discrimination in Employment Act Do Not Require a Court to Disregard Equities Favoring an Innocent Employer When the Administrative Charge of Discrimination Contains No Allegation of Constructive Discharge and the Discharge Claim Is Not "Like or Reasonably Related" to the Allegations in the Charge Filed by the Plaintiff.

A. The Importance Of The Issue.

This case presents a classic issue regarding consideration to be given to defendants with respect to equitable arguments under the ADEA. Under the Ninth Circuit's analysis, and contrary to the holdings of other circuits, extreme prejudice to an employer does not matter and is not to be taken into account. This conflict between the circuits has a far-reaching impact because in some circuits defendants can successfully demonstrate that they have been prejudiced by a plaintiff's failure to comply with the ADEA's requirements, while according to the Ninth Circuit opinion prejudice to an innocent employer does not matter. Thus, in some circuits defendants can rely on the ADEA's time limitations for filing an EEOC charge and a lawsuit while in others they cannot.

The analysis used by the Ninth Circuit amounts to a conclusive presumption in favor of employees and against employers. This approach is constitutionally flawed because it violates due process rights in that it deprives the lower court of its discretion to balance the equities. Also, this presumption is based upon economic status (employer-employee) and thus violates the principles of equal protection. The need to reverse such a ruling is even more evident in light of recent decisions including individual managers within the meaning of "employer" under the ADEA, meaning that individual defendants as well as companies will suffer from a court's failure to weigh the equities in favor of each party when basing decisions on equitable considerations.

B. The Ninth Circuit's Decision Conflicts With This Court's Decision In Baldwin County Welcome Center v. Brown.

In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984) (per curiam), this Court addressed a more threshold issue of whether an absence of prejudice to a defendant alone justified equitable tolling of filing requirements under Title VII. The Court held:

> Although absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply *once a factor that might justify such tolling is identified*, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.

466 U.S. at 152.

Accordingly, under *Baldwin County*, a finding that equitable considerations exist which support tolling or waiver does not automatically warrant allowing a plaintiff's complaint to exceed the scope of his EEOC charge. There must be a balancing of the equities, including taking into account the prejudice to the defendant. Thus, first, the Court must identify a factor justifying the tolling. If there is such a factor, then the Court must consider the prejudice to defendant or lack thereof.

In the case at bar the Ninth Circuit expressly ignored this second requirement, even though the Court noted that defendant was prejudiced by "the present unavailability of witnesses, changed personnel, the loss of relevant records, as well as the increased potential for back pay." (App., A-8). There can be no question as to the severe prejudice to Plough from Albano's failure to proceed properly. Each of the factors listed by the Ninth Circuit is frequently cited as evidence of prejudice under similar circumstances. Nonetheless, the Ninth Circuit, held, based solely upon Albano's allegations regarding the equities favoring him, that "equitable considerations excuse Albano's failure to exhaust administrative remedies." (App., A-8). Under Supreme Court precedent, this finding should have been the starting point for analysis rather than the end point. To rule out taking into consideration the relative equities favoring each party to the suit denies employers

their right to due process and equal protection under the United States Constitution.

The Ninth Circuit specifically refused to take equitable considerations favoring Plough into account. After listing the prejudicial effects on Plough, the Ninth Circuit then held that "a finding that the equities fall in favor of Plough, the employer, and against Albano, the age discrimination plaintiff, is contrary to the ADEA's remedial goals." (App., A-8). This finding is manifestly erroneous in that it is not mandated by the ADEA and clearly conflicts with the requirement under *Baldwin County* that lack of prejudice of defendant is a factor to be considered. Further, this distinction in the rights of employees and employers is clearly a distinction based on economic status (i.e., employee versus employer) and therefore, is a distinction which violates the constitutional provision for equal protection despite wealth or lack of wealth.

As this Court noted in *Baldwin County*:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants.

466 U.S. at 152. The Ninth Circuit's complete and utter disregard for the severe prejudice to Plough could only be the result of sympathy for Albano.

C. There is A Conflict In The Circuits.

Presently, a conflict exists between the decisions of the First and Sixth Circuit Courts of Appeals and those of the Eighth Circuit Court of Appeals and the Ninth Circuit in this case. The First Circuit Court of Appeals has set forth a three prong analysis to determine whether equitable tolling is appropriate. Initially, there must be a factor present which justifies tolling. If so, unlike the Ninth Circuit, the First Circuit has held that further analysis is required noting:

> We do not think, however, that the inquiry should end there. The court should also assess any countervailing equities against the plaintiff. For example, did he diligently pursue his claim, was his

> ignorance of his rights reasonable under the circumstances, and would allowing equitable tolling still fulfill the basic purposes behind the limited filing period — namely, providing the government an opportunity to conciliate while the complaint is fresh and *giving early notice to the employer of possible litigation.* Finally, even if the court finds that the above factors call for equitable tolling, it *must then take account of the degree to which delay prejudices the defendant.*

Kale v. Combined Insurance Co. of America, 861 F.2d 746, 753 (1st Cir. 1988) (citations omitted) (emphasis added). Analysis very similar to the First Circuit's has also been applied by the Sixth Circuit in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988) and in *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481 (6th Cir. 1989). In contrast, and in conflict, with these decisions the Eighth Circuit in interpreting *Baldwin County* has held that an equitable factor favoring a plaintiff "alone" might justify equitable tolling. *Warren v. Department of Army*, 867 F.2d 1156, 1160 (8th Cir. 1989).

The Ninth Circuit, however, ruled out any balancing of the equities whatsoever in the case at hand. The opinion below, if allowed to stand, means that merely alleging inaction by the EEOC will be sufficient in and of itself to avoid the ADEA's administrative filing requirements and allow a plaintiff's complaint to exceed the scope of his charge. This refusal to consider the prejudice to the defendant is clearly in conflict with those decisions holding that even when factors are present which may justify excusing a plaintiff from his failure to act in accordance with statutory requirements, the analysis cannot end there.

As the Sixth Circuit noted in *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1486 (6th Cir. 1989), this Court in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984) (per curiam) "cautioned against reading the timely filing requirement out of Title VII through liberal application of the doctrines of equitable tolling." The Ninth Circuit's decision in this matter does in an ADEA context exactly what this Court cautioned against in *Baldwin County*.

Plough submits that the analysis of the lower court in this case was correct, in contrast to that of the Ninth Circuit. It is clear from the Ninth

Circuit opinion that the appellate court went no further than ascertaining whether a factor was present which might justify tolling or waiver in favor of Albano. The Court's ultimate holding that a finding in favor of Plough, the employer, would be contrary to the remedial goals of the ADEA shows that the Ninth Circuit rejected out of hand any obligation to balance or weigh any factors in favor of Plough.

Nor did the Ninth Circuit consider any countervailing factors weighing against plaintiff, such as whether he had access to legal counsel within the time period. Finally, the Ninth Circuit blatantly disregarded the important notice function of the ADEA's administrative filing requirement.

Thus, there exists a conflict among the Circuit Courts of Appeals as to whether taking into account the relative equities between an employer and an employee violates the goals of the ADEA and whether the plight of the employers should be taken into account at all. This conflict is one that should be resolved by this Court as soon as possible.

II. The Age Discrimination Claims Assistance Act Does Not Apply When the EEOC Has Completed Its Investigation of the Employee's Charge and Issued a Notice of Closure Prior to the Expiration of the Two Year Statute of Limitations.

The Claims Act was passed to provide a limited extension of the statute of limitations for approximately 900 individuals whose charges were not processed by the EEOC in time to meet the applicable statute of limitations for filing suit under the ADEA.[1] The Act was designed to restore the right to sue to a limited and identifiable number of individuals and was not intended as a general expansion of the statute of limitations under the ADEA for all complainants. *See* 134 Cong. Rec. S 1747-48 (March 2, 1988); 134 Cong. Rec. H 1251-55 (March 29, 1988).

---

[1] ADEA actions are governed by the statute of limitations contained in the Portal-to-Portal Act. 29 U.S.C. § 626(e)(1). Consequently, actions under the ADEA must be commenced within two years from the date the cause of action accrued or, if a willful violation of the ADEA is established, within three years after the cause of action arose. 29 U.S.C. § 255(a).

Sections 3 and 4 of the Claims Act set forth specific requirements that must be met for the Act to apply. Section 4 requires the EEOC to give notice to each person who is entitled to the extended limitations period.[2]

The Ninth Circuit Court of Appeals ruled in this case that the section 4 notice requirement was not a condition precedent to the application of the extended period for suit. Although the Ninth Circuit is the only Court of Appeals to have interpreted the Claims Act, this ruling involves an important issue of federal employment law that should be settled by this Court.

The 1988 Claims Act affects some 900 individuals who have filed age discrimination charges. Recently, President Bush signed into law the Age Discrimination Claims Assistance Amendments of 1990, Pub. L. No. 101-504, 104 Stat. 1298 (1990), which is a further extension of the statute of limitations. Like the Claims Act of 1988, the 1990 amendments contain a similar section 4 notice requirement. Because of the limited period of applicability of the 1988 Claims Act and the additional ADEA charges that will be affected by the 1990 amendments, this Court should settle the issue presented here for the sake of uniformity in the application of the Claims Act.

The Court of Appeals' resolution of the Claims Act issue represents a far-reaching expansion of the Claims Act which is unsupported by the statute itself, the legislative history of the statute or decisions of this Court which have strictly construed statutes of limitations. This Court has recognized that strict adherence to the procedural requirements specified by the legislation is the best guarantee of evenhanded administration of the law. *Mohasco Corp. v. Silver*, 477 U.S. 807, 826 (1980). Strict adherence is particularly important where, as here, the sole purpose of the legislation is to revive claims that were previously barred by a statute of limitations.

In effect, the Ninth Circuit has rewritten the Claims Act to eliminate section 4 of the Act. The result is that a claimant whose charge was

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[2] No notice was given to Albano because he did not fall within the category of individuals who lost their right to sue. (App., A-16).

processed and closed by the EEOC in a timely fashion, and who simply failed to file a timely civil action, has been allowed to escape the statute of limitations which clearly barred his suit to the obvious prejudice of his innocent former employer.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.. 89-35768
D.C. No. CV-89-90-C

Ray F. Albano,
Plaintiff-Appellant,

v.

Schering-Plough Corporation;
Plough, Inc..; Plough Sales Corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

OPINION

Argued and Submitted
July 12, 1990—Seattle, Washington

Filed August 30, 1990

Before: Procter Hug, Jr., Dorothy W. Nelson and
Melvin Brunetti, Circuit Judges.
Opinion by Judge Hug

SUMMARY

Employment Discrimination

Reversing a grant of summary judgment, the court held that equitable considerations may excuse a claimant's noncompliance with the scope requirement of the Age Discrimination Employment Act when the Equal Employment Opportunity Commission has improperly refused to amend the claimant's timely EEOC charge.

Appellant Ray Albano worked for appellee Schering-Plough Corporation (Plough). On February 15, 1985, he filed an age discrimination charge with the EEOC. After he filed the charge, he had numerous conversations with the EEOC, and he told the EEOC officer that he was being forced to leave his job because of harassment. (He did leave, two weeks after the charge was filed.) The EEOC did not allow him to include a claim for constructive discharge, assuring him that his original charge encompassed that claim. Later, the EEOC told him that it would not pursue his charge and that it was too late to file suit. Four years later, in January 1989, he filed a complaint in district court under the ADEA. The district court granted Plough's motion for summary judgment on Albano's constructive discharge claim.

[1] The filing of an EEOC charge is a prerequisite to a civil action under the ADEA; the scope of the action is limited by the charge filed with the EEOC (the "scope requirement"). [2] Albano argued that equitable considerations should excuse his failure to comply with the scope requirement due to his reliance on the EEOC's refusal to amend the charge.

[3] Failure to file an EEOC charge is not jurisdictional but is merely a condition precedent to suit; therefore, equitable considerations apply to excuse failure to amend an EEOC charge. [4] When the prime rationale behind the scope requirement (to encourage EEOC investigation and informal reconciliation) is not promoted because of the EEOC's action, the inadequacy will not be charged to the claimant.

[5] Plough argued that, even if equitable considerations are found to apply, equities weigh in Plough's favor. [6] However, Albano's failure to exhaust administrative remedies is not his fault, and he should not be prejudiced by the EEOC's failing. Further, ruling that the equities favor Plough would be contrary to the ADEA's remedial goals.

[7] Plough asserted a statute of limitations defense. [8] However, Albano filed his complaint with in the prescribed period following the enactment of the Age Discrimination Claims Assistance Act.

COUNSEL

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OPINION

HUG, Circuit Judge:

Ray Albano appeals the district court's entry of summary judgment on his age discrimination claim against his former employer, Schering-Plough Corp., Plough, Inc. and Plough Sales Corporation ("Plough").

This case involves the requirement that before filing an action for age discrimination a charge must first be brought before the Equal Employment Opportunity Commission ("EEOC"). The specific claims involved in the court action ordinarily must also have been brought in EEOC charge. Albano filed a charge with the EEOC alleging age discrimination in promotion and sought to amend it to allege age discrimination resulting in his constructive discharge. The EEOC did not allow him to amend. In this case, we hold that the requirement that the specific claim be presented in the EEOC charge does not preclude establishing the claim in federal court when the failure to amend the charge to reflect a new claim is due to the fault of the EEOC. A second issue raised in this appeal is the interpretation of the Age Discrimination Claims Assistance Act of 1988, which extends the statute of limitations for filing age discrimination claims when the EEOC has caused the delay in filing. We hold the Act applies in this case and, thus, that the filing of the complaint was timely. We therefore reverse the summary judgment.

I.

It is undisputed that Albano worked for Plough from 1973 through March 1, 1985, in its sales division. Two weeks before Albano left his

job with Plough, on February 15, 1985, Albano filed an age discrimination charge with the EEOC. The charge alleged discrimination for failure to promote. The EEOC filed has been destroyed and, thus, the only evidence before the district court as to Albano's dealings with the EEOC is Albano's testimony. Albano's affidavit reveals the following facts. After Albano filed his original charge, he had no less than fourteen conversations with the EEOC. On at least three of these occasions, Albano told the EEOC officer that Plough's harassment was forcing him, and ultimately did force him, to leave his job. When Albano asked the EEOC to amend his charge to include a claim for constructive discharge, the EEOC did not allow him to do so and Albano was assured that his original charge for failure to promote encompassed this claim. The EEOC then told Albano it was not going to pursue his charge and that it was too late to file suit.

Approximately four years later, on January 23, 1989, Albano filed a complaint in federal court alleging, among other claims, age discrimination that resulted in his constructive discharge from his employment. The district court granted Plough's motion for summary judgment on Albano's constructive discharge claim, and the parties stipulated to dismissal of the remainder of Albano's claims with prejudice.

The issue before us is whether the district court properly granted Plough's motion for summary judgment on Albano's constructive discharge claim because the scope of Albano's civil complaint exceeded the scope of his EEOC charge or, alternatively, because Albano's claim is barred by the statute of limitations. We review a grant of summary judgment *de novo*. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 629-30 (9th Cir. 1987).

II.

[1] The filing of an EEOC charge is a prerequisite to bringing a civil action under the Age Discrimination Employment Act ("ADEA"). 29 U.S.C. § 626(d) (1988). The scope of a civil action alleging age discrimination is limited by the charge filed with the EEOC (the "scope requirement"). *Limongelli v. Postmaster General*, 707 F.2d 368, 373

(9th Cir. 1983). Claims regarding incidents not listed in an EEOC charge may nevertheless be asserted in a civil action if they are "like or reasonably related to the allegations of the EEOC charge." *Id.* (citation omitted).

Here, it is undisputed that Albano's EEOC charge relates only to age discrimination in failure to promote. In comparison, Albano's civil complaint alleged age discrimination resulting in his constructive discharge. We have previously held that a constructive discharge claim is not like or reasonably related to a charge of discrimination in promotion. *Ong v. Cleland*, 642 F.2d 316, 320 (9th Cir. 1981).[1]

[2] Albano does not maintain that his constructive discharge claim was "like or reasonably related to" his EEOC charge of discrimination in promotion. Instead, Albano argues that his failure to include his claim for constructive discharge in his EEOC charge was due to his reliance on the EEOC's refusal to allow him to amend his charge and numerous assurances that his EEOC charge encompassed his constructive discharge claim. Albano therefore contends that equitable considerations should excuse his failure to amend his EEOC charge, resulting in a failure to exhaust administrative remedies. Plough counters that equitable considerations should not apply in these circumstances. Plough maintains that it had no notice that it would be sued for constructive discharge, and that it will suffer severe prejudice if Albano's claim is allowed to go forward.

For the reasons set forth below, we hold that equitable considerations may excuse a claimant's noncompliance with the scope requirement, and resulting failure to exhaust administrative remedies, when the EEOC improperly refuses to amend the claimant's timely EEOC charge. There is no dispute that Albano's charge was timely filed. 29 U.S.C. § 626(d) (1988); 29 C.F.R. § 1626.8(c) (1989).

---

[1] This case, as well as a number of other cases cited in this opinion, are Title VII, not ADEA cases. However, we generally apply the same basic standards to both ADEA and Title VII cases. *Kauffman v. Sidereal Corp.*, 695 F.2d 343, 346 n.1 (9th Cir. 1982).

[3] It is well-settled that the failure to file an EEOC charge is not jurisdictional but is merely a condition precedent to suit, *Stache v. Int'l Union of Bricklayers and Allied Craftsmen*, 852 F.2d 1231, 1233 (9th Cir. 1988), *cert. denied*, 110 S.Ct. 64 (1989). *See also Gibbs v. Pierce County Law Enforcement Agency*, 785 F.2d 1396, 1398-99 (9th Cir. 1986). A claimant's failure to amend his charge to include a new claim is essentially the same as a claimant's failure to file an EEOC charge for the new claim. Framed in this manner, it is clear that equitable considerations may generally apply to excuse a claimant's failure to amend his EEOC charge.

In holding that an EEOC charge must be like or reasonably related to the civil complaint, we have emphasized the role of the EEOC in facilitating the administrative process in employment discrimination cases. *See, e.g., Ong*, 642 F.2d at 320; *Brown v. Puget Sound Elec. Apprenticeship v. Training Trust*, 732 F.2d 726, 730 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985). When, as here, a claimant repeatedly requests amendment of his charge, the collapse of the EEOC's conciliatory and investigatory function is due to the EEOC's own errors, not the claimant's.

[4] Accordingly, the EEOC's failure to investigate a claimant's discrimination claim and to promote informal conciliation does not bar a claimant from brining suit in federal court. *Waters v. Heublein, Inc.*, 547 F.2d 466, 468 (9th Cir. 1976) (a "plaintiff is not barred from bringing suit by the EEOC's allegedly incomplete investigation or less than vigorous attempts at conciliation"), *cert. denied*, 433 U.S. 915 (1977). Thus, when the prime rationale behind the scope requirement (to encourage EEOC investigation and informal conciliation) is not promoted due to the agency's improper refusal to amend the EEOC charge, the inadequacy will not be charged to the claimant.

The EEOC's refusal to amend a timely EEOC charge is comparable to the EEOC's failure to investigate a charge and promote informal conciliation. Both amount to the EEOC's failure to follow its own rules. *See* 29 C.F.R. § 1626.8(c) (1989) ("[a] charge may be amended to clarify or amplify allegations made therein"); 29 C.F.R. § 1626.12 (1989) ("[u]pon receipt of a charge, the Commission shall promptly

attempt to eliminate any alleged unlawful practice by informal methods . . ."). The agency's improper refusal to amend a charge, like an inadequate investigation, should not bar the claimant from bringing a civil suit. *See Waters*, 547 F.2d at 468; *See also Hicks v. ABT Assocs., Inc.*, 572 F.2d 960, 964 (3d Cir. 1978).

Plough claims that equitable considerations should not apply in these circumstances because the purpose of the scope requirement is not served. Specifically, Plough maintains that it was not adequately notified that Albano would file a constructive discharge claim in federal court.

Plough's reliance on the notice function is misplaced. We view the EEOC charge primarily as an impetus to EEOC investigation and conciliation, not as a pleading giving notice to the employer. *See Ong*, 642 F.2d at 320; *Brown*, 732 F.2d at 730. Further, even recognizing the role of the EEOC charge in placing an employer on notice of the claims against it, the claimant is not responsible for the absence of notice in these circumstances. It is the EEOC, not the claimant, who is responsible for notifying the employer of the claims alleged in the EEOC charge. 29 U.S.C. § 626(d) (1988). Thus, the claimant should not be penalized because of the EEOC's own errors. *See Carter v. Smith Food King*, 765 F.2d 916, 924 (9th Cir. 1985) ("claimant's right to pursue a civil action 'is not to be prejudiced' by the EEOC's failure to properly process a grievance after it has been filed") (citation omitted).

III.

Having decided that equitable considerations generally apply when the scope of a civil complaint exceeds the EEOC charge due to the EEOC's improper refusal to amend a timely EEOC charge, we next decide whether the facts of this case warrant application of equitable considerations. We find that they do.

Albano's detailed declaration, outlining his efforts to have his charge amended, was undisputed by Plough. Albano had no less than fourteen conversations with the EEOC. On at least three occasions, the EEOC assured Albano that his charge encompassed his claim for

constructive discharge and refused his efforts to amend. Under these facts, we hold that equitable considerations excuse Albano's failure to exhaust administrative remedies.

[5] Plough argues that even if equitable considerations generally apply in these circumstances, the equities weigh in favor of Plough. Plough notes the present unavailability of witnesses, changed personnel, the loss of relevant records, as well as the increased potential for back pay if Albano is permitted to bring his constructive discharge claim.

[6] While we are sympathetic to Plough's contentions, we nevertheless decline to find in favor of Plough and against Albano in these circumstances. Albano did all that could reasonably be expected to ensure that the EEOC was aware of his constructive discharge claim. The EEOC, not Albano, is to blame for Albano's failure to exhaust administrative remedies. An age discrimination plaintiff should not be prejudiced by the EEOC's failure to properly process a timely filed charge. *See Carter*, 765 F.2d at 924. *See also Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 923 n.2 (9th Cir.), *cert. denied*, 459 U.S. 971 (1982). Moreover, a finding that the equities fall in favor of Plough, the employer, and against Albano, the age discrimination plaintiff, is contrary to the ADEA's remedial goals. *See* 29 U.S.C. § 621 (1988); *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981) (noting the remedial purposes behind the ADEA).

IV.

[7] Plough contends that there is another barrier to Albano's civil action for constructive discharge. Plough argues that Albano's complaint is barred by the statute of limitations.

Actions under the ADEA must be commenced within two years after the cause of action accrued, or within three years if the violation is willful. 29 U.S.C. §§ 255(a), 626(e)(1) (1988). Albano filed the present action on January 23, 1989, approximately four years after he left his job with Plough. Thus, Albano's action is barred by the statute of limitations, unless it is saved by later congressional legislation.

Albano maintains that his action is saved by the Age Discrimination Claims Assistance Act of 1938, 29 U.S.C. § 626 note (1988) ("the Claims Act").

The Claims Act extends the statute of limitations for bringing suit under the ADEA for persons who were jeopardized by the EEOC's delayed processing of their age discrimination complaints. Section 3 of the Claims Act permits a person to bring an action in federal court 540 days after the date of the Act's enactment (April 7, 1988) if four conditions are met. Those conditions are:

1. A charge was timely filed with the EEOC;

2. The EEOC did not either eliminate the alleged unlawful practice by conciliation, conference, and persuasion or notify the claimant in writing of the disposition of the charge and the right of the person to bring a civil action on the charge;

3. The statute of limitations on the claim ran before the date of the enactment of the Claims Act; and

4. A civil action on the claim was not brought by the EEOC or the claimant before the running of the statute of limitations.

Albano's contends that he never received a written notice from the EEOC informing him of the disposition in his case and his right to sue. He was simply told by the EEOC that it was too late to sue. This is uncontradicted in the record. The remaining conditions for application of the statute, as set forth in section 3 of the Claims Act, were also fulfilled. Albano's charge was timely; the charge was not eliminated by informal methods; the statute of limitations had expired; and neither Albano nor the EEOC brought a civil suit within the limitations period.

Plough does not argue that Albano failed to satisfy the conditions set forth in section 3 of the Claims Act. Instead, Plough contends that section 4 of the Act must be satisfied before the limitations period is extended under section 3. Section 4 requires the EEOC to notify the plaintiff within 60 days of the Claims Act's effective date of the plaintiff's expanded rights under the ADEA. Plough maintains that

because Albano did not receive such a notice from the EEOC, he may not avail himself of the protections of the Claims Act.

[8] The purpose of the Claims Assistance Act was to remedy a situation in which claimants had lost their rights to bring a civil action because the EEOC had failed to act or provide right-to-sue letters before the statute of limitations ran. The obvious purpose of the notice provision of section 4 of the Act is to notify the claimants of the applicability of this remedial section to them. If a claimant did file his complaint within the extended period, without the EEOC notifying him of this remedial act, the notice provision becomes superfluous. Section 4 is not meant to be a condition precedent to the application of the extension, but rather a means of notifying the claimant of his rights under the Claims Act. It would frustrate the will of Congress, in its attempt to remedy the harsh effects of the EEOC's inaction, by permitting further inaction by the EEOC to negate the provisions of the remedial act. *See Rottersman v. CBS, Inc.*, 726 F. Supp. 484, 493 (S.D.N.Y. 1989). Therefore, the fact that Albano did not receive a notice from the EEOC informing him of the Claims Act application to his case does not preclude its application. Albano filed his complaint within the prescribed 540 days after the enactment of the Claims Act, and the filing is therefore timely.

V.

Albano's civil complaint is not foreclosed because of the lack of an amended charge before the EEOC and is not barred by the statute of limitations. The district court's summary judgment is therefore reversed. Albano's request for attorneys' fees is premature. *See Proctor v. Consolidated Freightways Corp. of Delaware*, 795 F.2d 1472, 1478-79 (9th Cir. 1986) (denying attorneys' fees to plaintiff who secured reversal of the trial court's grant of summary judgment on her civil rights claim because the plaintiff only won the right to a trial).

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Cause No. C89-90C

RAY F. ALBANO,
Plaintiff,

v.

SCHERING-PLOUGH CORPORATION, et al.,
Defendants.

JUDGMENT ON DECISION BY THE COURT

This action came on for consideration before the court, United States District Judge John C. Coughenour presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that defendants' motion for summary judgment is GRANTED.

DATED this 29th day of August, 1989.

/s/ Julie Mahnke
Deputy Clerk of Court

JUDGMENT ON DECISION
BY THE COURT

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Cause No. C89-90C

RAY F. ALBANO,
Plaintiff,

v.

SCHERING-PLOUGH CORPORATION, et al.,
Defendants.

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable John C. Coughenour, U. S. District Judge:

Defendants' motion for summary judgment is GRANTED. Plaintiff has shown insufficient facts to justify invocation of the equitable modification doctrine, even if said doctrine were available under the circumstances of this case.

Filed and entered this 29th day of August, 1989.

BRUCE RIFKIN, Clerk.

By /s/ Julie Mahnke
Deputy Clerk

MINUTE ORDER

APPENDIX D

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-90

RAY F. ALBANO,
Plaintiff,

v.

SCHERING-PLOUGH CORPORATION;
PLOUGH, INC.; and
PLOUGH SALES CORPORATION,
Defendants.

AFFIDAVIT OF PHILIP S. MORSE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, PHILIP S. MORSE, being first duly sworn, upon oath depose and say:

1. I am one of the attorneys of record on behalf of defendant Schering-Plough Corporation in the above-captioned matter. I make this statement of my own personal knowledge and belief.

2. Attached hereto as an exhibit is a true and correct Affidavit of Jeanette M. Leino dated September 18, 1989.

/s/ Philip S. Morse

SUBSCRIBED AND SWORN to before me this 29th day of September, 1989.

/s/ Gale W. Schwarb
NOTARY PUBLIC in and for the State
Washington, residing at Edmonds
My Commission expires: 11/27/90

1846b

APPENDIX E

Charge No. 101851655

In the Matter of
Ray F. Albano,
Charging Party,

v.

Plough Sales Corporation,
Respondent.

AFFIDAVIT of Jeanette M. Leino

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, Jeanette M. Leino, do hereby swear and depose as follows:

1. I am the District Director for the Equal Employment Opportunity Commission, Seattle District Office.

2. The charge, *Albano v. Plough Sales Corporation*, charge number 101-85-1655, was filed with and investigated by this office. This case alleged a violation of the Age Discrimination In Employment Act (ADEA).

3. The charging party in *Albano v. Plough Sales Corporation* alleged that the violation of the ADEA occurred on January 24, 1985.

4. *Albano v. Plough* was closed on April 18, 1986, because the investigator found no reasonable cause to believe that discrimination had occurred.

5. The case file in *Albano v. Plough Sales Corporation* was destroyed pursuant to EEOC regulations which govern inventory control regulations for the agency.

6. Because this case was investigated within the ADEA's two year statute of limitations, it was not covered by the Age Discrimination Claims Assistance Act of 1988.

/s/ Jeanette M. Leino
District Director

SUBSCRIBED AND SWORN to before me this 18 day of September, 1989.

/s/ Barbara J. Standel
Notary Public in and for the
State of Washington, residing
at Seattle
My commission expires
September 29, 1991

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil Action No. C89-90

RAY F. ALBANO,
Plaintiff,
v.
SCHERING-PLOUGH CORPORATION;
PLOUGH, INC.; and
PLOUGH SALES CORPORATION,
Defendants.

AFFIDAVIT OF BEVERLY J. DANIELS

STATE OF TENNESSEE)
)
COUNTY OF SHELBY)

I, Beverly J. Daniels, having been duly sworn, state:

1. I have personal knowledge of the facts set forth in this affidavit and am competent to testify to these facts.

2. I am employed as Manager, EEO Programs for Plough Sales Corporation and am responsible for handling charges of discrimination that are filed with the Equal Employment Opportunity Commission (EEOC) against the company.

3. I was the contact person for Plough Sales Corporation in the investigation conducted by the EEOC of charge no. 101-85-1655 filed by Ray F. Albano against Plough Sales Corporation.

4. I have reviewed documents and correspondence between the EEOC and Plough Sales Corporation relating to this charge of discrimination, and attached as Exhibit A-1 is a true and correct copy of the charge of discrimination filed by Ray F. Albano against Plough Sales Corporation, which was received from the EEOC.

5. During the course of the investigation by the EEOC of Ray Albano's charge of discrimination, the EEOC did not request any information concerning Mr. Albano's termination of employment and did not investigate any matters other than those that appear on the face of the charge. Mr. Albano never amended his charge with the EEOC to allege discriminatory discharge nor did he ever file any new charge with the EEOC concerning his termination.

6. Attached as Exhibit A-2 is a true and correct copy of a letter dated April 18, 1986 received from the EEOC advising that the Commission would not proceed further with the processing of Mr. Albano's charge as the EEOC had been unable to substantiate the allegations of discrimination.

I have read the foregoing statement and it is true and correct to the best of my knowledge, information and belief.

/s/ Beverly J. Daniels

Sworn to and subscribed before me this 7th day of April, 1989.

/s/Wanda Howard
Notary Public

My Commission Expires:
Nov. 2, 1991

EQUAL EMPLOYMENT OPPOR[illegible]UNITY COMMISSION

[illegible]RSON[illegible]LING CHARGE

101851655
Plough Sales, Corp.
c/o Jeff Norman
13600 N.E. 9th Place, #C-1-201
Bellevue, Washington 98005

THIS PERSON (Check One)	
CLAIMS TO BE AGGRIEVED	X
IS FILING ON BEHALF OF OTHER PERSON(S)	
DATE OF ALLEGED VIOLATION	
PLACE OF ALLEGED VIOLATION	
CHARGE NUMBER	

NOTICE OF CHARGE OF DISCRIMINATION

(See reverse side of this notice for additional information)

ou are hereby notified that a charge of employment discrimination has been filed against your organization under:

☐ Title VII of the Civil Rights Act of 1964.

☑ The Age Discrimination in Employment Act of 1967.

☐ An Equal Pay Act (29 USC. §206(d)) investigation will be conducted concurrently with our investigation of this charge.

The boxes checked below apply to your organization:

1. ☑ No action is required on your part at this time.
2. ☐ Please submit by _____ a statement of your position with respect to the allegation(s) contained in this charge, with copies of any supporting documentation. This material will be made a part of the file and will be considered at the time that we investigate this charge. Your prompt response to this request will make it easier to conduct and conclude our investigation of this charge.
3. ☐ Please respond fully by _____ to the attached request for information which pertains to the allegations contained in this charge. Such information will be made a part of the file and will be considered by the Commission during the course of its investigation of the charge.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

_____
(Commission Representative)

_____
(Telephone Number)

☑ Enclosure: Copy of Charge

BASIS OF DISCRIMINATION

☐ RACE ☐ COLOR ☐ SEX ☐ RETALIATION ☐ AGE ☐ RELIGION ☐ NATIONAL ORIGIN

CIRCUMSTANCES OF ALLEGED VIOLATION:

DATE	TYPED NAME/TITLE OF AUTHORIZED EEOC OFFICIAL	SIGNATU[illegible]
	[illegible]ROBIN W. MIKE[illegible]	Donald W. Rise P.G.

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER
☐ FEPA
☒ EEOC

Washington State Human Rights Commission and EEOC
(State or local Agency, if any)

NAME (Indicate Mr., Mo., or Mrs.)
RAY F. ALBANO

HOME TELEPHONE NO. (Include Area Co
(206) 776-5708

STREET ADDRESS: 19312 - 73rd PLACE WEST
CITY, STATE AND ZIP CODE: SEATTLE, WASHINGTON 98036
COUNTY: KING

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: PLOUGH SALES CORPORATION C/O JEFF NORMAN
NO. OF EMPLOYEES/MEMBERS: OVER 20
TELEPHONE NUMBER (Include Area Code): (206) 644-8881
STREET ADDRESS: 13600 N.E. 9TH PLACE, #C-1-201
CITY, STATE AND ZIP CODE: BELLEVUE, WASHINGTON 98005

NAME: PLOUGH SALES CORPORATION, A DIVISION OF SHERING PLOUGH
TELEPHONE NUMBER (Include Area Code):
STREET ADDRESS: 3030 JACKSON STREET
CITY, STATE AND ZIP CODE: MEMPHIS, TENNESSEE 38151

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))
☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☒ AGE ☐ RETALIATION ☐ OTHER (Specify)

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, year)
JANUARY 24, 1985

THE PARTICULARS ARE (If additional space is needed, attached extra sheet(s)):

I STATEMENT OF PERSONAL HARM

On January 24, 1985, I was formally notified that I was not being considered for a promotion. I have been treated differently than workers under 40 years of age in the past for previous promotional opportunities; in fact, I was demoted in January 1984. Respondent is in the sales industry and employs over 20 workers nationwide.

II RESPONDENT REASON FOR ADVERSE ACTION

During a meeting on January 24, 1985, with Jeff Norman (29 plus), District Manager, I was informed that I was not being considered for the Key Account position. Over the phone on January 25, 1985, Dave Heath ( ) and Hank Cicerone (late 30's) verified that I was not being considered for the Key Account Rep. based in Seattle.

III DISCRIMINATION STATEMENT

I believe I have been discriminated against because of my age, 54 years, in that:

1. I have maintained a positive work history throughout my twelve (12) years of professional service. I have never received poor comments from Supervisors regarding either my job performance or conduct.

(CONTINUED ON PAGE 2)

☐ I also want this charge filed with the EEOC.
I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date 2/15/85 Charging Party (Signature)

NOTARY - (When necessary to meet State and Local Requirements

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year) 2/15/85

FEB 19 AM 9 25

CHARGE OF DISCRIMINATION - PAGE 2

ENTER CHARGE NUMBER
[ ] FEPA
[X] EEOC

RAY F. ALBANO
VS.
PLOUGH SALES CORPORATION
C/O JEFF NORMAN

(CONTINUED FROM PAGE 1)

2. There was a promotional vacancy for the "Key Account" Representative in our district.

3. I indicated my interest to be considered for this promotion as these had been accounts I regularly serviced in the past.

4. My qualifications for this position are excellent and I have held a similar position with respondent of equal authority and responsibility in the past.

5. I have been denied an interviewing opportunity and subsequently the position, and I do not believe I was seriously considered for the job.

6. Since November 1983, I have been aware that promotional positions have gone to younger outside hires and have heard comments regarding internal, over age 40 workers like:
   - "(they) are too heavy and no professional;"
   - "(they) the old timers don't know;"
   - "(they) are too old to handle the modern day computer technology."

[ ] I also want this charge filed with the EEOC.
I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

10/1/1

NOTARY - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
XX

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Seattle District Office
1321 - 2nd Avenue 7th Floor
Seattle, Washington 98101
Telephone (206) 442-0968

Ms. Beverly J. Daniels
Manager, EEO Programs
Plough, Inc.
P.O. Box 377
Memphis, TN 38151

Charge No. 101851655

Dear Ms. Daniels:

This is to inform you that the Commission has made a determination that it will not proceed further with its processing of the above referenced charge under the Age Discrimination in Employment Act (ADEA) because the Commission has been unable to substantiate the allegations of discrimination.

The fact that the Commission has terminated processing of this case does not certify that your organization is in compliance, nor does it affect the rights of any affected party to file suit against you under the Age Discrimination in Employment Act.

On Behalf of the Commission:

Date: 04/18/86

/s/ Donald W. Muse
District Director

Supreme Court, U.S.
FILED
JUN 4 1991
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 90-874

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SCHERING-PLOUGH CORPORATION, PLOUGH, INC., and PLOUGH SALES CORPORATION,

Petitioners,

vs.

RAY F. ALBANO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Sidney J. Strong
Strong & Kydd
1616 Bank of
California Building
900 Fourth Avenue
Seattle, Washington 98164
(206) 623-5221

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Was the Ninth Circuit Court of Appeals correct in finding that equitable considerations may excuse a claimant's noncompliance with the EEOC charge scope requirements, when the EEOC improperly refuses to amend the claimant's timely EEOC charge?

2. May the EEOC deprive a claimant of the extended limitations period under the Age Discrimination Claims Assistance Act of 1988, 29 U.S.C. § 626 note (1988) by failing to notify him of the application of the Act to his case?

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Age Discrimination Claims Assistance Act of 1988, 29 U.S.C. § 626 . . . . . *i, 3, 10-12*

Rule 3 of the Federal Rules of Civil Procedure *4*

The Age Discrimination In Employment Act of 1967, 29 U.S.C. § 621 et seq. ("ADEA") *2-4, 7, 10*

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NO. 90-874

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SCHERING-PLOUGH CORPORATION, PLOUGH, INC., and PLOUGH SALES CORPORATION,

Petitioners,

vs.

RAY F. ALBANO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RESPONDENT'S STATEMENT OF CONCURRENCE

For purposes of this Response, respondent adopts the statements in the Petition for Certiorari under the headings, "Opinions Below," "Statutory Provisions Involved" and "Statement of the Case."

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Remedial Goals of the Age Discrimination in Employment Act Require a Court to Excuse a Claimant's Failure to Comply With the EEOC Charge Scope Requirements, When the EEOC Improperly Refuses to Amend the Claimant's Timely EEOC Charge.

A. The Ninth Circuit Decision Does Not Present Novel Issues.

The Age Discrimination In Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA") is a remedial Act, enacted by Congress to protect employees from unlawful age discrimination. To invoke the Act, a claimant must file a timely administrative charge with the Equal Employment Opportunity Commission ("EEOC") and permit the EEOC to process that charge. Failing a satisfactory resolution, the claimant may initiate a federal district court suit. When, without fault of the claimant, the administrative preconditions for litigation have not been

satisfied, the courts have applied equitable principles to permit court access and thereby carry out the remedial purposes of the Act.

In 1988, Congress provided statutory protection to claimants whose rights under the ADEA were jeopardized by acts or omissions of the EEOC. The Age Discrimination Claims Assistance Act of 1988, 29 U.S.C. § 626 note (1988) ("the Claims Act")[1], provided an extended limitations period to claimants whose age discrimination claims had not been properly processed by the EEOC. In so doing, Congress was fully cognizant of the fact that an extended limitations period might make it more difficult for employers to defend age discrimination claims. Nonetheless, Congress concluded that the remedial purposes of the ADEA were not to be thwarted by EEOC

---

[1]The Age Discrimination Claims Assistance Act of 1988 has since been amended by H.R. 5794, the Age Discrimination Claims Assistance Act of 1990 to further extend the limitation period to 450 days from November 3, 1990.

error and that employers must bear any prejudice caused by the extension of the ADEA limitation periods.

Consistent with these statutory purposes, the Court below holds only that EEOC error cannot prevent an age discrimination claimant's court action. The Court does not deny an employer the opportunity to defend the action. Petitioner's claims of intolerable, if not unconstitutional employer prejudice, resulting from "the present unavailability of witnesses, changed personnel, the loss of relevant records, as well as the increased potential for back pay" are whimsical. (Pet. App., A-8). For the Ninth Circuit to adopt petitioner's arguments, it would have had to ignore the remedial purposes of the ADEA and the equitable tolling principles found in this Court's decisions.

B. The Ninth Circuit's Decision Does Not Conflict With This Court's Decision In Baldwin County Welcome Center v. Brown.

In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) (per curiam), this Court considered the issue of when is an action commenced under Rule 3 of

the Federal Rules of Civil Procedure. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1), requires an action to be brought within 90 days of the receipt of a right-to-sue letter. Only the right-to-sue letter itself was filed within the 90 day period, and this was held not to have commenced the action as the letter was not the equivalent of a complaint.

While the Court found no factual basis to justify an equitable tolling of the statute, it provided a review of the circumstances under which such tolling would be available.

> This is not a case in which a claimant has received inadequate notice (citation omitted); or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon (citation omitted); or where the court has led the plaintiff to believe that she had done everything required of her, (citation omitted). Nor is this a case where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction. (citations omitted). The simple fact is that Brown was told three times what she must do to preserve her claim, and she did not do it. One who fails to act diligently

> cannot invoke equitable principles to excuse that lack of diligence.

Baldwin, 466 U.S. at 152.

The Ninth Circuit found the facts necessary to support the application of these equitable principles to the present case, noting that, "Albano had no less than fourteen conversations with the EEOC. On at least three occasions, the EEOC assured Albano that his charge encompassed his claim for constructive discharge and refused his efforts to amend." (Pet. App., A-7,8; Res. App. A-5). Under these circumstances, the Ninth Circuit held that respondent had done all that he could have been reasonably expected to do and that the EEOC, and not respondent, must accept the blame for his failure to exhaust administrative remedies. (Pet. App., A-8).

Petitioner does not dispute these findings, but asserts respondent must still be denied court access because, like respondent, it also is prejudiced. Petitioner asserts that *Baldwin* should deny the application of the

principles of equitable tolling to respondent's claim, while at the same time petitioner invokes this very same sympathy for its own position. (Pet. App., 6,7). Petitioner misperceives the remedial purposes of the ADEA. In the ADEA, Congress provided a right of litigation to age discrimination claimants and not to their employers. The Court below correctly found that to deprive an innocent claimant of his statutory rights because of the inequitable conduct of a third party, would be inconsistent with "the ADEA's remedial goals." (Pet. App., A-8). *Baldwin* is not to the contrary.

C. There is No Conflict in the Circuits.

Petitioner argues that the decision below is in conflict with the First Circuit's decision of *Kale v. Combined Insurance Co. of America*, 861 F.2d 746 (1st Cir. 1988) and the Sixth Circuit decisions of *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481 (6th Cir. 1989) and *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988). However, all are factually inapposite. None considered the

applicability of equitable principles when the EEOC, and not the claimant, is the party solely responsible for the claimant's failure to exhaust administrative remedies.

In *Kale*, the First Circuit refused to excuse the timeliness requirement for filing with the EEOC, finding that the claimant had actual notice of the filing requirement and was not entitled to equitable tolling. While the Court spoke of "absence of prejudice" as a factor, it did so only as *Baldwin* had done, that is, a claimant could not use the absence of prejudice as "an independent basis for invoking the doctrine. . . ." *Kale*, 861 F.2d at 753. Respondent makes no such claim here.

Puckett is factually similar to *Baldwin*. Its holding is based upon the absence of any facts to support equitable tolling. In *Puckett*, plaintiff could have, but failed to request a right-to-sue letter before filing her lawsuit. The Court found this conduct to amount "to a position of arrogance" and not the "compelling circumstances" described in *Baldwin*, which could justify the application of

equitable tolling or waiver. *Puckett*, 889 F.2d at 1488. Petitioner has not alleged inequitable conduct of respondent.

Andrews, another case premised upon timeliness, expressly limited its inquiry to an examination of plaintiffs "diligence in pursing their rights and the reasonableness of their ignorance of the effect of (an earlier court order)." *Id.*, 851 F.2d at 151. Finding plaintiffs to be diligent, the Court applied equitable tolling and excused an otherwise untimely appeal. Again, petitioner has not alleged inequitable conduct of respondent.

The decision below does not conflict with the decisions of the First and Sixth Circuits. Unlike the Ninth Circuit, these Courts had as an issue, the conduct of the claimants and whether that conduct justified the application of equitable principles. Petitioner elected not to contest whether respondent was without fault. Having conceded this issue, it is immaterial whether petitioner was also without fault. Assuming arguendo, the innocence

of both parties, the Ninth Circuit had no choice but to decide in favor of respondent as the claimant. The remedial purposes of the ADEA could not be fulfilled by denying claimant access to the courts. The decisions of the First and Sixth Circuits are not inconsistent with this result.

II. The Age Discrimination Claims Assistance Act Applies Whether or Not the EEOC Notifies a Claimant of His Expanded Rights Under That Act.

Petitioner correctly points out that the Claims Act extends the ADEA limitation periods for certain claimants and that its Section 4 requires the EEOC to notify these claimants of the Act. The EEOC did not notify respondent prompting petitioner to argue that the EEOC omission requires dismissal of respondent's complaint.

In effect, petitioner argues that the EEOC should be able to determine whether or not a claimant is entitled to the benefits of the Claims Act. More specifically, petitioner asserts that while the Claims Act was to correct

EEOC omissions, and that the EEOC was required to notify affected claimants in the event the EEOC failed in this obligation, it is the claimant who must suffer the loss of his statutory rights. Petitioner offers no support for this argument and ignores the uncontested facts:

> 12. Until my case was finally closed by EEOC, I recall having at least 14 different contacts with EEOC. Of those contacts, only two were in the EEOC office. The first was with the intake worker when I signed the complaint. The last was with an EEOC employee who said that the EEOC did not intend to do anything with my case and that it was too late to file a suit. I never had a face to face meeting with the EEOC investigator and would not recognize her. Although I wanted to meet with her, she was never interested in having me go into the EEOC office. (emphasis added).

(Res. App., A-5).

The record supports only the conclusion that the EEOC did not process respondent's claim as required by law and delayed its action on respondent's claim beyond the statutory period. Clearly, this is precisely the kind of agency error the Claims Act was intended to remedy.

Petitioner would amend the Claims Act to allow the EEOC to undo its error by failing or refusing to notify claimants of the Acts provisions. The Ninth Circuit properly found that EEOC noncompliance with the Claims Act cannot cause a forfeiture of claimant's rights.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

The Hon. John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAY F. ALBANO, Plaintiff, v. SCHERING-PLOUGH CORPORATION; PLOUGH, INC. and PLOUGH SALES CORPORATION, Defendants.	NO. C89-90 PLAINTIFF'S DECLARATION IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

1. I am Ray Albano, the plaintiff in this action and submit this declaration in opposition to defendant's Motion for Summary Judgment.

2. I was born March 3, 1931. For most of my adult working life I have been employed in sales. I have done well in all the jobs I have held and with the exception of my employment with defendants, I have never been in an employment relationship where I ever claimed that I had been discriminated against or where I have ever filed charges of employment discrimination.

3. I began my employment with defendants in 1973 as a sales representative. In 1983, I became aware of a plan adopted by defendant to force the retirement of its sales staff who were over the age of 50. I learned of this plan through attendance at sales meetings and discussions with various employees. In 1985, I applied for a promotion and was denied it. I was the most qualified candidate and the individu-

al selected was less than 30 years old. I asked to be considered for another position in early 1985, and was informed that I would not be considered. When I inquired as to why I did not get the position, one reason given me by one of defendant's Area Vice Presidents was that, "It was a young man's job."

4. In the fall of 1984, I learned that I had degenerative arthritis in my hip would have to have the hip replaced. I was in the hospital for about 14 days and on medical leave from October 1984, until I received a medical release in January 1985. While on leave I was expected to continue with as much of my sales responsibilities as possible. I even received a performance evaluation while on medical leave, which claimed that I was not meeting my sales goals.

5. The day after I was released to return to work, my supervisor met with me and said that I was being placed on probation for poor performance. He also removed several of my key accounts and reduced my commissions. Finally, he said that I would now have to call on retail stores and would have to help build displays for these stores. This meant carrying heavy cases into the stores as well as a lot of lifting and bending in the display construction. Because of my physical and medical limitations from the surgery, this kind of physical activity was very painful and difficult for me. However, I was told that I had no choice, and would have to do as directed, if I wanted to continue working for defendants.

6. When all of this happened, I simply was unable to handle it. I could not

afford to lose my job. I was still in pain from my surgery. I believed that these work conditions were being imposed on me to force me to quit. I became scared and upset to the point where I could go home at night and cry. I tried to force myself to do the best I could, but day after day, my supervisor would continue to find fault with my work performance, and finally, I decided I had no choice but file a discrimination charge against the defendants.

7. I went to the Equal Employment Opportunity Commission in February 1985 and spoke to an intake worker. In our conversation I covered all these areas with her: I told her about the promotions I had been denied and why I believed it was because of my age. I told her about my knowledge of the company's efforts to get rid of its

workers over age 50. I told her about my surgery and the pressures placed on me during my medical leave. I told her about being placed on probation and my commission being reduced the day after I returned to work. I told her that I had been given a job assignment that I found almost impossible to do. I told her that I believed that my employer was harassing me to make me quit my job.

8. However, the EEOC intake worker cut me short and said that she would only put the denied promotion claim in the EEOC charge. She said that I would be assigned an investigator and that I should raise the harassment issue with that investigator. I tried to discuss it further and she refused and said I should sign the complaint as it was drafted. I did.

9. In late February 1985, a woman from EEOC called me and identified herself as having been assigned my case for investigation. As conditions at work had gotten worse, I attempted to discuss the harassment issue with her. However, she said the EEOC charge as drafted was sufficient and would automatically include my concerns about harassment.

10. When I could no longer emotionally or physically handle my job, I terminated on March 1, 1985. A week or two later I called the EEOC investigator and informed her that the work conditions had gotten so bad that I had to terminate my employment. I then asked her if the EEOC charge should not be amended to reflect my termination. She told me that was not necessary.

11. I had other telephone conversations with the investigator, but I remember a

specific conversation I had with her on the termination issue in either April or May 1985. I had attended a Queen Anne high school reunion and met a classmate who was also a lawyer. I told him what had happened and he told me to contact EEOC again because he believed that my EEOC charge should be amended to allege wrongful termination because of harassment.

12. I followed his advice and called the EEOC investigator and specifically asked her to amend the EEOC charge to claim wrongful termination. And once again she refused, saying that all my rights were adequately protected in the charge as the termination issue would be included in the general age discrimination claims I had made. I felt there was nothing more I could do, so I let the issue drop.

12. Until my case was finally closed by EEOC, I recall having at least 14 different contacts with EEOC. Of those contacts, only two were in the EEOC office. The first was with the intake worker when I signed the complaint. The last was with an EEOC employee who said that the EEOC did not intend to do anything with my case and that it was too late to file a suit. I never had a face to face meeting with the EEOC investigator and would not recognize her. Although I wanted to meet with her, she was never interested in having me go into the EEOC office.

13. The primary reason I went to EEOC in the first place was because I was fearful of losing my job. When I first went to the EEOC, I fully disclosed or attempted to fully disclose every fact which supported my fear. After I was forced out of

my job with defendants, I informed EEOC of that fact and on at least two occasions asked to have the EEOC charge amended. Each time I was told that the charge would not be amended since I was adequately protected by the original charge. I don't know what else I could have done to force the EEOC to protect my interests. I relied on EEOC expertise and their statements to me that my interests were fully protected. Until defendants filed their present motion, I was totally unaware that I might not be able to raise a constructive discharge issue because of the claimed factual inadequacy of my EEOC charge.

I swear under penalty of perjury under the laws of the State of Washington that to the best of my knowledge the foregoing is true and correct.

DATED this 1st day of June, 1989.

/s/
Ray F. Albano

(3)

No. 90-874

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1990

SCHERING-PLOUGH CORPORATION, PLOUGH, INC. and PLOUGH SALES CORPORATION,

Petitioners,

vs.

RAY F. ALBANO,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. Albano's Brief In Opposition, like the Ninth Circuit's opinion that is at issue, emphasizes the very reason Plough seeks review in this Court. The issue which Plough seeks to have considered is not whether there was prejudice to Albano or fault on Albano's part, but whether a court is required to ignore the prejudice to a defendant in considering whether to impose an extended statute of limitations on an innocent defendant. It is conceded by all that such hardships do exist and that

extreme prejudice to Plough will be the inevitable result, absent review by this Court.

This Court's opinions as well as those of lower courts clearly teach that in order to determine whether a limitation ought to be tolled it is necessary to weigh the equities. It is not enough to say that a plaintiff has suffered prejudice and was not at fault. There must be some examination of the prejudice to the defendant and lack of fault by defendant as well in a weighing of the equities. Otherwise, every plaintiff who misses a statute of limitations can secure a trial on the merits simply by alleging facts showing no fault of his own.

Albano has made much of the fact that this case involves an "innocent" plaintiff (conceded by defendant only for purposes of the Motion for Summary Judgment and ensuing appeals). However, the facts show at least equally clearly that no fault whatsoever lies with Plough. When confronted with two equally innocent parties a court should be required to fairly consider the prejudice to each party. To allow a statute of limitations to be extended against an innocent party which justifiably relied on this limitation, with absolutely no consideration of the detriment to that party, is an anathema to our justice system.

In sum, the mere factual allegation that a plaintiff is innocent in failing to abide by the statute of limitations should not result in a complete and utter disregard for the defendant's prejudice and relative innocence. Thus, the Court of Appeals grievously erred in refusing to even consider the extreme prejudice to Plough. Because statutes of limitations are an intregal part of our legal system

and are relied upon as such, it is of great importance that this Court determine whether the degree of prejudice to an innocent party defendant must be taken into account in deciding whether to toll a statute of limitations.

II. With respect to the issues surrounding the Claims Assistance Act, Albano contends in his brief that it was not his fault that he did not receive a letter and therefore, the Claims Assistance Act does apply. This argument turns the entire issue of the application of Claims Assistance Act on its head. As established by the Equal Employment Opportunity Commission's Affidavit (App. E), Albano received no letter or notice because he was not covered by the Claims Assistance Act. Thus, Albano's fault is not at issue. The issue is whether he is a covered individual within the meaning of the Claims Assistance Act. Clearly he is not, and the fact that no letter was sent to him proves that he was not entitled to the extended limitations period, rather than the opposite.

As the Claims Assistance Act was passed in derogation of a statute of limitations, the burden should be on Albano to establish that he is entitled to the benefit of the Act. Whether Albano's burden is stated in terms of a condition precedent or otherwise, Albano has failed to demonstrate the application of the Claims Assistance Act to him.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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